What role for the European Union in the Western Sahara Conflict?[1]

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1. Introduction

The right to self-determination of Sahrawi people has been established by International Law and the United Nations from the beginning of the decolonization process. Moreover, the self-determination of people is a *ius cogens* rule, therefore it is a higher-level standard and has an unwavering content for subjects of International Law, such as sovereign States or International Organizations. Nevertheless, Western Sahara remains as Africa's last colony, administered on the large part by an occupying power. This stalemate in the conflict that occurs from the 1991 ceasefire, has led to a false equation of the positions of both parties, Morocco and POLISARIO Front.

The European Union has emerged as another concerned party, unwilling to become involved but committed to develop a commercial and political relationship with his principal partner in the MENA region: Morocco. This controversial and polarizing relationship could jeopardize the Organization leading principles in its External Action, (i.e., human rights and the respect of the self-determination of people). This procedure could have an adverse effect, thereby contravening rather than reinforcing the Organization's values and previous practices in the EU concerning non-self-governing territories.

This paper will explore the different and latest developments of the ongoing conflict examining the International Community's actions or lack of. It will focus on the action of the European Union in the Western Sahara conflict, through an analysis which falls into three parts: the examination of a largely expected "common position" and its previous attempts, secondly a comparative examination of the policy developed by the EU in other non-self-governing territories and, finally, an examination of the various judicial pronouncements concerning the question of the commercial agreements between Morocco and the EU.

2. International Community (in)action

After the stagnation of the peace process in Western Sahara with the breakdown of the Peace Plan, the United Nations ("UN") has been calling for negotiations between the two sides of the conflict, Morocco and POLISARIO Front. In UNSCR 1754 (2007) the Security Council urged negotiations between POLISARIO and Moroccan government[2]. Nevertheless, the

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2 UNSCR 1754 (30 April 2007). [Consult. Jan. 2019]. Available at: http://www.un.org/es/comun/docs/index.asp?symbol=S/RES/1754%20(2007)&referer=http://www.un.org/es/sc/documents/resolutions/2007.shtml&Lang=E.

nature of the negotiations seems to be directly confronted with the respect of the self-determination principle and the UNGAR 1514 (XV). A self-determination process implies a decision being taken by the people under colonization, because they are the subject of sovereignty in International Law (Barsh, 1994).

After the meetings Manhansset I (2007), II (2007), III (2008) and IV (2010) there was no significant progress. This series of negotiations between the parties, sponsored by the United Nations, changed focus in 2010, when the Special Envoy of the Secretary-General, Christopher Ross, returned. Although, in 2010, 2011 and 2012 the results were similar and a few points have been accepted, as the coordination of two parties for the cleaning of mines in the territory under control of the POLISARIO. In 2017, the newly elected Special Envoy, Horst Köhler, brings a new impetus and refocuses negotiation efforts making it clear that "no action should be taken, which may constitute a change to the status quo"[3].

So far, the stagnation of the question of Western Sahara persists, and the positions of the parties seem irreconcilable. The POLISARIO Front calls for a self-determination referendum, including the option of independence, however Morocco only offers a limited autonomy for Western Sahara, and a referendum for just two options: integration into the Kingdom of Morocco or limited Autonomy Statute.

International Law has insisted in the necessity of a *good faith* in negotiation processes, and the lack of intention it is liable to result in International Responsibility. The International Court of Justice, in the North Sea Continental Shelf case pointed out that:

> "*The Parties were under an obligation to enter into negotiations with a view to arriving at an agreement and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they were so to conduct themselves that the negotiations were meaningful, which would not be the case when one of them insisted upon its own position without contemplating any modification of it. This obligation was merely a special application of a principle underlying all international relations, which was moreover recognized in Article 33 of the Charter of the United Nations as one of the methods for the peaceful settlement of international disputes. The Parties were under an obligation to act in such a way that in the particular case, and taking all the circumstances into account, equitable principles were applied*"[4].

In the 2016 Report of the UN Secretary-General, he expressed

> *"regret at the absence of genuine negotiations without preconditions and in good faith to achieve a mutually acceptable political solution, which will provide for the self-determination of the people of Western Sahara".*

Moreover he claimed that

> *"the status quo was no longer an option*" and that "*the parties had yet to bridge the divide between their mutually exclusive positions and neither party had succeeded in winning over the other party to its proposal and moving towards a solution*"[5].

The crisis arisen in *Gueguerat* has been a constraint in the process of negotiation in the past three years, even with the efforts of the Secretary General to address the situation proposing an expert mission for this particular. In the 2018 Report, Secretary General welcomed "*the*

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3 Statement attributable to the Spokesman for the Secretary-General on Western Sahara [scroll down for French], 19 May 2017. [Consult. Jan.2019] Available at: https://www.un.org/sg/en/content/sg/statement/2018-05-19/statement-attributable-spokesman-secretary-general-western-sahara.

4 Summary of the Summary of the Judgment of 20 February 1969, North Sea Continental Shelf Case, Judgment of 20 February 1969.

5 Report of the Secretary-General on the situation concerning Western Sahara, 19 April 2016, S/2016/355, par. 9 and par. 17.

positive response of Frente Polisario to (...) proposal to deploy an expert mission as part of this process and strongly encourage Morocco to reconsider this initiative so that both parties can engage in a bona fide discussion on the matter"[6]. The call for direct negotiations has continued with Personal Envoy Horst Köhler. The fragility of MINURSO seems to have been mitigated by conducting a "*a strategic review (...) to provide an in-depth analysis of the Mission and recommend measures to improve its mandate delivery*"[7] by mid-2018.
It is uncertain whether a series of direct talks will be able to reach a conclusive end to the conflict as important differences still remain between the two parties. Despite the fact that negotiations have been revealed to be clearly inefficient, the Security Council does not seem to have any intentions to attempt other ways of reaching a peaceful settlement of disputes. This position becomes a stagnation of the Chapter VI of the United Nations Charter, whose article 37.2 expresses:

> "*If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate*".

After the frustration of Settlement Plan and Peace Plan in 2001, we cannot consider that the conflict is regulated by any valid peace agreement. If both parties are inside a negotiation process, without a peace agreement regulating this process, international institutions have to be careful in the respect of peremptory rules and customary International Law. The United Nations cannot be the sponsor of any negotiation in which *ius cogens* is being dismissed. As we can see in the UN Secretary-General's 2016 Report[8], the Moroccan Minister-Delegate for Foreign Affairs stated that the basis of the process "*consisted of a political solution that did not bring the status of Western Sahara into question, inasmuch as "the Sahara is already Moroccan*".

3. European Union in the middle of Hamada

The conflict in Western Sahara is for the European Union one of those issues that is becoming increasingly complicated without having been foreseen beforehand. This can be proven due to the fact that the European Communities did not pronounce on the matter until 1981.
Today, however, circumstances have changed and forced the European Communities to do so. Especially as the natural resources of the Western Sahara territory seem to be an indispensable commercial line for the European Union as well as continuous source of conflicts. A divergent course of action that the EU has agreed to pass despite the warnings of illegality of several of its institutions (Parliament, CJEU).
The following sections are a review of the political and legal positions maintained on the conflict, as well as the EU's commercial relationship with Morocco and the implications on Sahrawi natural resources (Olson, 2006: 30).

3.1. Common Position on Conflict and other Utopias

In 1981 the European Parliament ("EP") adopted its first resolution on Western Sahara[9], establishing a position contrary to the line taken by the United Nations, followed by

6 Report of the Secretary-General on the situation concerning Western Sahara, 29 March 2018, S/2018/277, par. 308.
7 Ibidem, par. 82.
8 Report of the Secretary-General on the situation concerning Western Sahara, 19 April 2016, S/2016/355, par. 9 and par. 17.
9 Nevertheless, from 1979 European Parliament made secondary pronouncements including Western Sahara.

France during that time, and considering what happened in the territory was an internal struggle for its control, it called on Algeria and Morocco to find a way out, ignoring the local population, the actual holders of the right to self-determination (Torrejón Rodríguez, 2014: 303). Eight years later, Parliament would rectify this position with a second resolution in which it recognized the right to self-determination of the Saharawi people and called for negotiations between Morocco and the POLISARIO, identifying it as part of the conflict. In 1987 the EP protested for the imprisonments and arrests of the Moroccan police in the territory, although without pronouncing on the legal situation.

This position would continue in the EP Resolution on the Violation of Human Rights in the Western Sahara of 1990, in which the Parliament protests against the violations that take place in the territory at the same time that it congratulates the POLISARIO Front for the liberation of 200 prisoners of war.

In 1991, the European Parliament approved a resolution in support of the peace plan sponsored by the UN. From this moment on, the EP will, at least once a year, pronounce itself on different aspects of the conflict such as human rights, those people who have disappeared (after arrest or detention), prisoners of war or political trials that take place in Morocco. In 1995, given the obstacles imposed by Morocco on the census for a referendum that would ruin the peace plan, Parliament is adamant in asking *"the Moroccan authorities to respect their commitments and to end their delaying manoeuvres aimed at stopping the implementation of the peace plan*". By 1998, the EP asks the Council to establish a common position on the conflict, but this position has not been adopted to date.

Official relations between the EU and the POLISARIO will not begin to be more fluid and distinct until the end of the 80s, when the Organization is positioned in favour of the self-determination.

In 1987, according to Benabdallah "*the Polisario proposed to the EU the signing of an agreement to legitimise the fishing in the waters alongside the Western Sahara coasts, but the EU declined this proposal*" (Benabdallah, 2009). It is important to underline that, in accordance with International Law, the POLISARIO is the sole and legitimate representative of the Sahrawi people and, in consequence, the EU could have signed that agreement with the National Liberation Movement in the exercise of its international subjectivity.

The position of the EP concerning the dispute has passed through different phases (Urruela, 1995: 112), and has become more aware of the principle of self-determination since 2004. In October 2005 the EP, in support of UNSCR1495 (2003) adopted various resolutions about human rights, calling Morocco to cooperate in "*ascertaining what had happened to people who has disappeared since the conflict began*", and about humanitarian aid to Saharawi refugees, initiating a new and more active phase in the relation between the conflict and this institution. One year later, in 2006, the European Parliament pronounced itself on the issue of the natural resources of the Western Sahara with a legislative resolution[10], proposing amendments to the UN Security Council's proposed regulation.

The Saharawi National Liberation Movement is also an "interest group" accredited in the EP, which gives it the power to be heard in matters related to the issue. The nominative accreditation of the representative of the POLISARIO Front by the European Union in the EP also signifies respect for the code of conduct which requires renouncing any claim of having an official relationship beyond that with the Parliament. This highlights the little identification of this type of connection, more designed for interest groups, than for an entity of the National Liberation Movement type.

[10] European Parliament legislative resolution on the proposal for a Council regulation on the conclusion of the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco (COM(2005)0692 – C6-0040/2006 – 2005/0280(CNS). [Consult. Jan.2019].

In fact, partially contravening this code of conduct, the EP decided to establish another point of connection with the POLISARIO granting it some participation in the Delegation for relations with the Maghreb countries and the Maghreb Union, in which an *ad hoc* delegation (already extinct) was established for the Western Sahara.
On the other hand, the international legal personality of the POLISARIO Front in the Organization is manifested by the fact of being a beneficiary of humanitarian aid by ECHO (European Humanitarian Aid Office). The National Liberation Movement is the official manager of the Saharawi refugee camps in Tindouf (Algeria), which benefited right up to the year 2017 of more than 230 million euros, since it began to be the recipient of the aid in 1993. It is enough considering that Saharawi people are being represented by POLISARIO Front in the EU.
Nevertheless, we cannot talk about a common position so far, even when the EP has clarified its position in the latest resolutions.

3.2. The position of the EU with respect to other Non-Self-Governing Territories

To a reduced policy of Non-Self Governing territories (Timor, Crimea or Palestine), the Western Saharan seems to have arisen as the most discordant element. Certainly, situations of occupation are often among the most difficult challenges for International Community. The European Union, as a third party, has the obligation not to contribute to the occupation. We talk about occupation when a territory has been annexed illegally, considering moreover that this is supposed to be a temporary status. This stance of non-contribution demands a policy of non-recognition of the legality of the occupation, along with other elements of foreign policy that are to be connected with the *de facto* administration of the territory. This requires for the EU to "*refuse to recognize legislative and other changes in the occupied territory, they should refrain from engaging in economic and other activities that sustain that occupation and they should seriously consider sanctions against the responsible government*" (Wrange, 2015: 2).
However, the EU has demonstrated a varied and confusing positon on how to deal with occupation of territories, as discussed below.

Crimea

Close to that view described by Wrange is the policy developed by the EU with respect to Crimea. The relations between the EU and Russia have traditionally been marked by different points of tension and distension (Fernández Liesa, 2017), and one of them has been Crimea. The illegal annexation of this territory by Russia in 2014 can be considered inside the scope of UNGAR 3314 (XXIX) as aggression[11], constituting a serious violation of Ukraine's national sovereignty. And this is precisely what the European Council declared on 20th March of 2014 expressing a strongly condemn for "the illegal annexation of Crimea and Sevastopol to the Russian Federation and will not recognize it". Similar declarations have been stated along the years, in 2018 the EU considered extending the restrictive measures imposed on Russia until 29 June 2019[12]. Indeed the EU imposed, starting from 2014, different processes (diplomatic measures, individual restrictive measures, restrictions on economic relations with Crimea and Sevastopol, economic sanctions targeting exchanges with

[11] "Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations", Article 1, Definition of aggression. UNGAR 3314 (XXIX), 12/14/1974.
[12] Council of the EU, Press Release, 346/18.

Russia in specific economic sectors and measures concerning economic cooperation)[13] that are still being imposed. Similarly, EU Member States have followed a consistent policy of non-recognition.

These are undoubtedly elements of a good practice when talking about EU and Member States policy that should be followed in cases of Non-Self Governing Territories governed by occupying power. This practice of the EU arises from the Crimea case:

1. Follow the non-recognition obligation according to UNSCR 2625 (XXV).
2. Avoid investment and economic activity in the occupied territory under the aegis of occupying power (Wrange, 2015a: 10).
3. Impose sanctions against the occupying power and its private entities.
4. Diplomatic consequences between the relations of the EU and the occupying power.

Palestine

The good practices developed in the case of Crimea do not find a parallel in the EU's policy respecting another Non-Self Governing Territory, Palestine. The case of Palestine offers an irresolute practice with interesting elements to be addressed. Considering the first obligation of the EU regarding an occupation, it is a fact that the EU has repeatedly condemned the occupation of the Palestine territory by Israel, not recognizing Israeli´s sovereignty over the settlement, that now dominates more than 45 % of the territory. The International Court of Justice in its Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (2004) stated that "*all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction*"[14]. Nevertheless, Israel has been eligible for funding in different economic programs of the EU. Also the EU-Israel Association Agreement was signed in Brussels in 1995, followed by successive frameworks[15]. The significant aspect of these commercial relations is that the Agreement excluded the occupied territory. On the one hand, EU is maintaining commercial relations with the occupying power, and therefore there is no sanction, measure or diplomatic consequence perceptible in this case. On the other, the Agreement does respect the Palestine settlement by excluding it, meaning an application of the coherence principle (EU does not recognise the intended Israeli sovereignty in the Palestine settlement, in consequence with the non-recognition policy the Organization has followed in this particular). But in practice things have turned out to be different, some sources have informed that "products are often marked as originating in Israel, even when the place of manufacture is in Occupied Palestine Territory" (Wrange).

Human rights

The EU must consider human rights as a principle, and take into account its own rules and laws. For instance, article 21 of the *Treaty of European Union* declares:

[13] Commission Guidance Note on the implementation of certain provisions of Regulation (EU) No 833/2014, European Commission, Brussels, 25/09/2015.
[14] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I. C. J. Reports 2004, p. 136, par. 159.
[15] This Association Agreement was replacing the previous Cooperation Agreement of 1975.

> "*The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law".*

The EU must ensure consistency and effectiveness in the application of its external policy, which implies not only statements and declarations but an active role in defending its key external principles. It shall mean that countermeasures and other actions be applied consistently.
In fact in 2008 the EU adopted the Guidelines on Human Rights to be used in dialogues with third countries[16] in which a basic principle was developed:

> "*The European Union undertakes to intensify the process of integrating human rights and democratisation objectives ("mainstreaming") into all aspects of its external policies*" further asserting that "*the European Union will ensure that the issue of human rights, democracy and the rule of law is incorporated into all meetings and discussions it has with third countries, at every level, including political dialogue and, if necessary, at the highest level*".

The Euro-Mediterranean Partnership (EMP) (including Morocco and Israel)[17] represented 9.4 % of total EU external trade in 2016 and it is an expanding area of economic integration. The existence of Non-Self-Governing territories in this spot of the Mediterranean necessarily makes it more difficult to develop a consistent commercial and political relationship (Newman *et al.*, 2004: 11). As it can be seen, the EU finds itself at a crossroad. As PACE points out "*this dialogue framed EU– Mediterranean relations in terms of principles, including respect for human rights Democratization and democracy and the use of peaceful means for the settlement of disputes*" (Pace, 2009: 42). Thus, through the EMP's institutionalized framework, the EU committed itself to democracy promotion and Mediterranean partners signed up in Barcelona Declaration to "*Develop the rule of law and democracy in their political systems*"[18]. In the case of Palestine and Western Sahara it is important to underline the obligation of the EU "*to develop the rule of law and democracy in their political systems, while recognizing in this framework the right of each of them to choose and freely develop its own political, socio-cultural, economic and judicial system*", and more significantly, in conformity with the Barcelona Declaration, the EU is committed to "*respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of States, as reflected in agreements between relevant parties*"[19].

3.3. Lights and shadows of the CJEU's judgments: immediate consequences

The relations between the EU and Morocco have had several approaches and trade agreements since the 2000 Euro-Mediterranean Agreement was adopted, establishing a greater approach in commercial relations, especially agricultural. In the development of

[16] EU guidelines on human rights dialogues with third countries, 2016, p. 14.
[17] Euro-Mediterranean partnership objective is the creation of a free trade area in the Mediterranean, and include the following countries: Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Palestine, Syria, Tunisia and Turkey. [Consult. Jan.2019] Available at: http://ec.europa.eu/trade/policy/countries-and-regions/regions/euro-mediterranean-partnership/. The programs are funded under the European Neighbourhood Policy.
[18] Barcelona declaration adopted at the Euro-Mediterranean Conference, 27-28/11/95.
[19] Ibidem.

this agreement, in 2005 a Plan of Action was accorded and, subsequently, the agreement for the liberalization of agricultural products and fishing by-products was signed in 2012. As a result of this agreement, in the same year, Commission Implementing Regulation (EU) N.º 812/2012 is adopted, which modifies Council Regulation (EC) No. 747/2001 regarding quotas. Union tariffs are applied to certain agricultural products and processed agricultural products, originating in Morocco.
In 2013 were adopted

> *the Council Decision on the signing, on behalf of the European Union, of the Protocol between the European Union and the Kingdom of Morocco establishing the fishing opportunities and the financial contribution established in the Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco (2013/720/EU),* and *Council Regulation (EU) No 1270/2013 on the allocation of fishing opportunities under the Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and the financial contribution provided for in the Partnership Agreement in the fisheries sector between the European Union and the Kingdom of Morocco* (L 328/40, of 7.12.2013).

Both instruments, although they were expected to be final and bring greater stability to the desired trade relations with Morocco, have suffered with this judicial journey initiated by the POLISARIO Front before the General Court of the EU, presenting an annulment remedy in 2012 (as a subject of International Law), for having included the territory of Western Sahara. The Judgment of the General Court of the European Union was adopted in December 2015[20]. Although the pronouncement is not very convincing, it is clear, at least, in affirming the need to respect International Law for the territory of Western Sahara (Soroeta Liceras, 2016: 205).
The 2015 Judgement required the exclusion of the territory of Western Sahara from the agreement between the EU and Morocco, annulling part of the agreement, but the Judgement was the object of a subsequent appeal by the Council of the European Union and was supported by Belgium, Spain, Germany, France, Portugal and Morocco. In a second Judgment of December 21, 2016, the Court of Justice of the EU finally decided to annul the Judgment adopted in 2015 because it considered that the legitimacy of the POLISARIO to request the annulment of the contested decision was not sufficiently proven.
Regarding the Appeal brought on 19 February 2016 by the Council of the European Union against the judgment of the General Court (Eighth Chamber) delivered on 10 December 2015 in Case T-512/12 POLISARIO Front v. Council, and according to International Law, it is necessary to point out the following: the Council posits that the Court has erred in considering that POLISARIO Front is capable of bringing proceedings before the Courts of the European Union, and this premise will be triumphant on the Council's Appeal and the Judgement of 21 December 2016.
However, we cannot forget that, according to International Law, POLISARIO is the legal and sole representative of Sahrawi people until Western Sahara territory can conclude the self-determination process. The legal status of the territory is still a Non-Self-Governing territory, and POLISARIO is the only legitimate entity recognized for the defence of their rights, as it is said in the UNSCR 2625 (XXV), the territory has a different status from the administrating power:

[20] 10 December 2015 partially annulling the 2013/720/EU: Council Decision of 15 November 2013 on the signing, on behalf of the European Union, of the Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in the Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco, in regards to the implementation of the agreement in the territory of Western Sahara.

> *"The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles".*

Furthermore, following Cassese, national liberation movements have "*the rights and obligations deriving from rules on treaty making. The existence of the power is evidenced by the numerous agreements various liberation movements have entered into on such matte*r". In fact, POLISARIO Front itself has signed international agreements, such as the peace agreement reached with Mauritania in 1979.

Even though this legal status is not considered clear enough to give procedural rights to POLISARIO Front, it cannot be denied the right of any legal person directly concerned to institute proceedings in the Court, as it is said by article 263 of the Treaty in the Functioning of the European Union:

> *"Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures".*

POLISARIO Front has to be considered a legal person in accordance to their stable condition, structures, statutes and representation in international and national practice acting as a legal person.

The Council submits that the General Court erred in law by holding that the applicant was directly and individually concerned by the decision annulled since the agreements between EU and Morocco include the territory of Western Sahara, as observed by "Human Rights Resource Watch" and others. It has been established the presence of more than a hundred and forty companies operating in the territory.

The General Assembly Resolution 1803 about Permanent Sovereignty over natural resources declares that "*the exploration, development and disposition of such resources, as well as the import of the foreign capital required for these purposes, should be in conformity with the rules and conditions which the peoples and nations freely consider to be necessary or desirable with regard to the authorization, restriction or prohibition of such activities*". According to this paragraph of the resolution (par. 2) the POLISARIO must conform to the trade agreement, as the sole and legitimate representative of Sahrawi people.

The exploitation of natural resources of a Non-Self Governing Territory makes it so that its sole representative can be considered legitimate, because the interests of the People are being affected and are in direct opposition with International Law (Ferrer Lloret, 2017).

POLISARIO has an individual interest in the effects of the Decision, and according to the general principle of *pacta tertiis nec nocent nec prosunt,* it makes the accord annullable and contrary to International Law. Furthermore, the article 29 of Vienna Convention on the Law of Treaties stated that "*Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory*". Due to the special condition of the territory of Western Sahara, in order to fully respect the responsibilities under the UN Charter we cannot consider that Morocco can include the territory of Western Sahara for several reasons, that can be found in UNSCR 1514 (15) or General Assembly Resolution 2625 (XXV) and the enshrined *ius cogens* rule of self-determination.

The Council considered the Court to have erred in law in the Judgement of 2015 by basing the annulment on a *plea* which had not been raised by the applicant and with regard to

which the Council was unable to express its views. This point does not correspond to the facts in the application. The first recurrent, POLISARIO Front, has pointed out the violation of human rights under the article 67 of the Treaty in the Functioning of the European Union and the article 6 of the European Union Treaty.

In the POLISARIO Front's plea, it is necessary to consider that, when pointing out the coordination principle of the European Union, the question that raises is the protection of human rights in the context of trade agreements. As a key rule in European Union law is constituted by the Charter of Fundamental Rights of the European Union and the principles for conducting agreements with third-party States always in the respect of the human rights (human rights clause).

The *Human Rights and Democracy: EU Strategic Framework and EU Action Plan* (11417/12, 25 June 2012), stated that

> "*the EU will promote human rights in all areas of its external action without exception. In particular, it will integrate the promotion of human rights into trade (...)",* and it is establishing a material obligation for the EU when it affirms "*The EU will place human rights at the centre of its relations with all third countries, including its strategic partners. While firmly based on universal norms, the EU's policy on human rights will be carefully designed for the circumstances of each country, not least through the development of country human rights strategies*".

In the special context analysed, the Action Plan is more than clear regarding the European Neighbourhood Policy, claiming that

> *"The EU will step up its effort to make best use of the human rights clause in political framework agreements with third countries. In the European Neighbourhood Policy countries, the EU has firmly committed itself to supporting a comprehensive agenda of locally-led political reform, with democracy and human rights at its centre, including through the policy of "more for more". Human rights will remain at the heart of the EU's enlargement policy".*

The aforementioned Action Plan and the whole sense of the European Union Law makes unclear and inconsistent the claim sustained by the Council when it stated that "*the General Court erred in law by holding that the Council was required to examine the possible impact of the production activities concerning the products covered by the agreement concluded by the decision annulled on the human rights of the population of Western Sahara before adopting the decision annulled".*

The Decision faced International Law basic resolutions, as the UNGAR 1803's declaration about Permanent Sovereignty over natural resources when it point out that *"Foreign investment agreements freely entered into by or between sovereign States shall be observed in good faith; States and international organizations shall strictly and conscientiously respect the sovereignty of peoples and nations over their natural wealth and resources in accordance with the Charter and the principles set forth in the present resolution".*

The Council also claims that the General Court erred in law in its first Judgement by holding that the Council was required to examine whether there was evidence, under the agreement concluded by that decision, of the exploitation of the natural resources of the territory of Western Sahara under Moroccan control which may be carried out to the detriment of its inhabitants and may infringe their fundamental rights, before adoption. Nevertheless, the sole and legitimate representative of Sahrawi People, in the territory still considered by International Law as Non-Self Governing, declared that the exploitation of natural resources is not improving the situations of Saharawi local people.

It is easy to understand that an examination of the effects of the trade-agreements in the population could negatively affect the population. UNGAR 1803 states *"In cases where authorization is granted, the capital imported and the earnings on that capital shall be governed by the terms thereof, by the national legislation in force, and by international law"*. We can look at this statement considering that there are exemptions when it is clear and obvious that the representative of the People have given express authorization to the "*de facto*" Administrator State to conclude such agreements. It seems clear that in the case we are examining there is a serious lack of good faith and a lack of fulfilment of international principles considered in this resolution and other more general and common like the mentioned *"pacta tertiis nec nocent nec prosunt"*.

The Council claims that the General Court erred in law by partially annulling the contested decision, which had the effect of altering its substance. This claim made by the Council seems to be acknowledging and affirming that the Decision includes the territory of Western Sahara as an important part of the trade agreement. Considering it as a substantial element of the Decision to assume that the POLISARIO Front is an individual subject affected by it, that the Sahrawi People are sovereign, and whose sovereignty over the natural resources has to be respected and not exploited, until the agreement goes in the behalf of the indigenous population, fact that could not have been adequately proved. Moreover, according to the article 34 of the Vienna Convention on the Law of Treaties, *"A treaty does not create either obligations or rights for a third State without its consent"*.

It is true that we cannot consider that the Sahrawi Arab Democratic Republic is a State vis-à-vis the International Community, but we must insist we are in front of a Non-Self Governing Territory whose sole and legitimate representative is the POLISARIO Front, who has not been consulted relating the negotiations and entry into force of the agreement and the Decision, much more when the national liberation movement must have a special representation in order to exercise their rights to defend the rights of Sahrawi people.

The remarkable element of the Judgement of the Appeal (Court of Justice of the EU, Grand Chamber) of 21 December 2016[21] is that the Grand Chamber sustained that the POLISARIO Front cannot be considered as a concerned party because it cannot be presumed that the Agreement between Morocco and the EU includes the territory of Western Sahara, based on good faith:

> *"It must be pointed out that, in order to be able to draw correct legal conclusions from the absence of a stipulation excluding Western Sahara from the territorial scope of the Association Agreement, in interpreting that agreement, the General Court was bound (...) to observe the rules of good faith"*[22].

Even more, the Court considers that this "good faith" is not controversial in the practice of the Agreement, even without having brought elements to eliminate the possibility of the illegal appropriation of the natural resources of Western Sahara and contenting itself with the presumption that:

> *"In view of the separate and distinct status accorded to the territory of Western Sahara by virtue of the principle of self-determination, in relation to that of any State, including the Kingdom of Morocco, the words 'territory of the Kingdom of Morocco' set out in Article 94 of the Association Agreement cannot, as the Commission maintains and as the Advocate General essentially pointed out in points 71 and 75 of his Opinion, be interpreted in such a way that Western Sahara is included within the territorial scope of that agreement"*[23].

[21] Judgment of the Court (Grand Chamber), 21 December 2016, ECLI:EU:C:2016:973, C-104/16 P.
[22] Ibidem, par. 86.
[23] Ibidem, par. 92.

On the other hand, The Grand Chamber confirmed the distinct status and the application of the self-determination principle to the legal context of the dispute.
The consequences were that the agreement was again fully in force and the international subjectivity of the POLISARIO Front, at the European regional level, is once again in question and the application on the Agreement bypassed.

Western Sahara Campaign UK

In May 2016, The High Court of Justice of the UK requested a preliminary ruling under Article 267 TFEU in the case of Western Sahara Campaign UK v. Commissioners for Her Majesty's Revenue and Customs[24].
The request argued "*the validity of the Fisheries Partnership Agreement and 2013 Protocol*" in accordance with International Law, presupposing that the territorial scope of the Agreement included the waters of Western Sahara.
The Court, following the Judgement of C-104/16 P, considers "*that the Fisheries Partnership Agreement and the 2013 Protocol must be interpreted, in accordance with the rules of international law that are binding on the European Union and that are applicable to relations between the Union and the Kingdom of Morocco, as meaning that the waters adjacent to the territory of Western Sahara do not fall within the scope of that agreement and that protocol".*

Action Brought on 24 April 2018- Aviation Agreement

In April 2018, the POLISARIO Front brought action against the Council regarding Council Decision (EU) 2018/146 of 22 January 2018 on its conclusion, on behalf of the Union, of the Euro-Mediterranean Aviation Agreement between the European Community and its Member States, of the one part, and the Kingdom of Morocco, of the other part (OJ 2018 L 26, p. 4).
The action, pending still a decision, understands that the agreement has been violating the Saharawi air space. Even more, it has been applied on a provisional basis for a period of 12 years, to the territory of Western Sahara, in breach if its separate and distinct status[25].
Beyond an alleged infringement of core principles and values guiding the European Union's external action, the action considers the lack of competence of both Morocco and the EU to negotiate and conclude international agreements that include the territory and the violation of the rights of defence of the sole representative of Saharawi People, thus the Council did not begin any discussion about the text with the POLISARIO, besides the violation of Vienna Convention given the relative effects of treaties.

Conclusions

We will have to wait for the Court of Justice's position on the pending actions, but it is clear that the international personality of POLISARIO Front is being strongly used in international tribunals, as the Court of Justice of the European Union. This is certainly an attribute of subjectivity that is being put into practice more than ever. The Court of Justice, however, considered that POLISARIO had no legitimacy to initiate the proceedings,

[24] The request has been made in two proceedings between, on the one hand, Western Sahara Campaign UK, and, on the other, the Commissioners for Her Majesty's Revenue and Customs and the Secretary of State for the Environment, Food and Rural Affairs (United Kingdom), respectively, on the implementation, by that authority and by that minister, of international agreements concluded between the European Union and the Kingdom of Morocco and the secondary legislation associated with those agreements.
[25] Action Brought on 24 April 2018, Front Polisario v. Council (Case T-275/18).

but only arguing that the agreement does not include the Western Sahara territory, and without subtracting elements of subjectivity to its condition of the National Liberation Movement.

Also, that is the reason why the EU now has the chance to explain itself on its position about the conflict, since said position has been not particularly defined so far. In analogous cases, such as Palestine, the EU has been clear to explicitly put apart the Non-Self-Governing territory to the Commercial policy conducted with Israel. It is very reasonable to ask the same for Western Sahara.

Even so, the Court of Justice has confirmed in cases C-104/16-P and C-266/16 the current status of Western Sahara as one of a decolonisation case with the necessity of respecting the self-determination principle. This has been done through formal elements and theory arguments based in a non-existent "good faith" which finally fails to accept that the several agreements concluded with Morocco are being applied illegally to the territory.

Regarding the Western Sahara Non-Self-Governing Territory, the European Union continues to contravene its own established practice as applied to in the cases of Palestine and Crimea and also ignores the violations of Human Rights that take place in the territory.

The commercial relations with this one remain unharmed, contravening its strong practice on Human Rights as emphasized by its relations with Cuba, its limited and difficult relations with Russia or the arms embargo applied to Sudan of the South.

The close relationship with its privileged MENA partner, Morocco, is riddled with different aspects that may bring a more controversial relationship to the south Mediterranean pair, such as migration, human trafficking, drug dealing and terrorism prevention. The EU does not seem to have any intention of souring the relation, but the Western Sahara dispute is continuing to disrupt more institutions in each movement.

Acronyms

CJEU – Court of Justice of the European Union
EMP – Euro-Mediterranean Parnership
EP – European Parliament
EU – European Union
MENA – Middle East and North Africa
MINURSO – Mission des Nations unies pour l'organisation d'un référendum au Sahara occidental
POLISARIO – Popular de Liberación de Saguía el-Hamra y Río de Oro
UN – United Nations
UNGAR – United Nations General Assembly Resolution
UNSCR – United Nations Security Council Resolution

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